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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERN C. STRAND and ELEANOR A.
STRAND

Plaintiffs-Appellants

V

No. 9707

FRED MAYNE and DETTA ANN
MAYNE

Defendants-Respondents

FILED
AUG 2 - 1952

Clerk, Supreme Court, Utah

APPELLANTS' BRIEF

Appeal from the Judgment of the
2nd District Court for Weber County,
Honorable Charles G. Cowley, Judge

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STATEMENT OF THE KIND OF CASE

This is an action arising under a uniform real estate contract by which the defendants, Mayne, sold certain motel property in Roy, Utah, to the plaintiffs, Strand, and the plaintiffs seek to avoid forfeiture of payments made on a contract and improvements made on the premises.

DISPOSITION IN LOWER COURT

From a judgment dismissing the plaintiffs' complaint with prejudice upon motion of the defendant for summary judgment, the plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment and permission to go to trial upon the merits.

STATEMENT OF FACTS

The appellants' complaint for a first cause of action (R.1) alleges that April 1, 1955 the plaintiffs as buyer entered into the contract marked Exhibit "A" and attached to the complaint with the defendants for the purchase of real estate consisting of land and seventeen motel units and certain personal property in Roy, Weber County, Utah. That the total purchase price was \$41,500.00, of which the plaintiffs paid \$7,578.58 as down payment and thereafter made additional payments up to and including the 3rd day of October, 1957 of \$10,875.00. That in addition, the appellants, in order to place the property in habitable condition, expended for repairs, improvements, additions and equipment \$9,567.37 which included converting a previously unusable portion of the front of the premises into a restaurant and coffee shop. That the total payments and improvements made by the appellants was the sum of \$29,020.95; that the repairs and improvements made by the appellants increased

the market value of the property by at least \$25,000.00. That after the execution of the agreement, the respondents wrongfully and continually interfered with the rental of the units of the motel and by reason of such interference the plaintiffs were unable to make payments after November 3, 1957. That on or about January 8, 1958 the respondents repossessed the premises. That the reasonable rental value of the premises was the sum of \$450.00 per month; that the retention by the respondents of the premises and payments theretofore made would be inequitable and unconscionable, and the appellants requested the court to determine the compensation to which the respondents might equitably be entitled and for such other relief as to the court was proper in the premises.

For second cause of action the appellants alleged that the respondents made certain representations with respect to the habitable condition, the roof, the floor and sewer connection, upon which the appellants relied and were induced to enter into the agreement, and that by reason of the falsity of the representations and the reliance thereon by the appellants, the appellants were damaged in the amount of \$29,020.95.

The answer of the respondents was generally a denial of the allegations of the complaint. Subsequently, the respondents filed an amended answer and counter-claim wherein the respondents alleged that the appellants on March 20, 1957 sold the property to Watterson under uniform real estate contract marked Exhibit "1" and attached to the answer and counter-claim, and that by such sale the appellants lost all of their rights and claims against the respondents. The respondents then allege on information and belief that certain individuals, Lucy Semora and Verda Lynn, as successors in interest to the appellants and Wattersons came into possession of the premises and that the respondents on or about January 8, 1958, commenced an action in the District Court for Weber County against Lucy Semora and Verda Lynn seeking restitution of the premises, and that such action against Lucy Semora and Verda

Lynn constituted res adjudicata as against the appellants (R.16). Respondents further alleged that the provision of the contract for liquidated damaged was binding upon the appellants. Answering the second cause of action relative to fraud, the respondents alleged that the appellants had inspected the premises, sought independent counsel and advice, relied upon their own judgment, were not misinformed and were bound by the provision of the contract that the buyer accept the premises in the present condition; that the appellants having elected to remain in possession of the premises after discovering the fraud were precluded from rescinding, and are estopped to make any claim against the defendants.

The respondents filed a motion for summary judgment (R.29) and a brief in support of a motion for summary judgment (R.30), and there having been several continuances in the interim, the respondents filed a new motion for summary judgment on October 13, 1961 (R.53) accompanied by an affidavit which recited that the attached brief in support of summary judgment supports the motion for summary judgment.

Depositions were taken, interrogatories were propounded, and requests for admissions of fact were presented.

The final brief of the respondents in support of the motion for summary judgment is contained in pages 76 to 98 of the record, and the brief of the plaintiffs resisting the motion for summary judgment is contained in pages 99 to 103 of the record. The facts as presented to the trial court in connection with the motion for summary judgment as contained in the brief and representations of the parties are graphically summarized as follows:

I

(R.110) (Tr. 12-15)

Mayne sold to Strand:

(R.5) Uniform Real Estate Contract, April 1, 1955.

Purchase Price \$41,500.00

Down Payment 7,578.58

\$33,921.42

Subsequent Payments:

Interest \$ 4,156.52

Principal 7,732.57

\$11,889.09

(Tr. 13) Balance of Principal as of 12/3/57 \$26,188.85

Improvements by Strand .. \$11,726.77

Down Payment 7,578.58

Subsequent Payments 11,889.09

Total Investment by

Strand \$31,194.44

(Not including current expenses)

Period occupied: 4/1/55 to 1/6/58 = 33 months

Reasonable Rental Value \$450.00 per month = \$14,850.00

Market Value on January 6, 1958 = \$63,000.00

(Market value claimed by Respondents as of December 15,
1961, \$35,000.00, R. 97).

II

Strand sold by new contract to Watterson:

(R.22) Uniform Real Estate Contract, March 20, 1957.

Purchase Price \$63,000.00

Recited Down Payment 500.00

Payment by assignment of
equities in two other contracts:

a. Nephi property netted nothing - Valueless

b. Salt Lake property may realize \$2,000.00

DEFAULTED and FORFEITED by Notice 1/29/58

III

Watterson assigned the contract with Strand to Goldsby and
Clinger July 31, 1957

Defaulted and Forfeited by notice 1/29/58

IV

(See File #33330, R. 117)

Action by Mayne for Repossession:

a. Notice to quit served upon Lucy Semora dated 1/8/58, and signed by John A. Hendricks, attorney for Mayne.

b. Complaint by Mayne vs. Lucy Semora and Verda Lynn, dated January 13, 1958, for restitution of possession.

c. Semora and Lynn answered in general denial, then subsequently by letter of attorney Tel Charlier, disclaimed, January 31, 1958.

d. Decree February 10, 1958, awarded possession of premises to Mayne.

V

Action Commenced by Strand vs. Mayne May 13, 1958.

The court heard the arguments of the parties on April 23, 1962 and took the matter under advisement (R.105). A transcript of the proceedings is included in the record (R. 116). The court rendered judgment dismissing the complaint with prejudice on May 16, 1962, (R.109). Appellants filed a motion for rehearing (R.106) and requested among other things that the court indicate the points upon which the court relied in granting the motion for summary judgment, which motion for rehearing was denied by the court.

ARGUMENT

In the conclusion to the respondents' brief (R.96) the respondents set forth four grounds upon which they con-

tended the motion for summary judgment was well taken, and the trial court not having specified the grounds upon which the judgment was granted, it is assumed that one or more of the four grounds stated by the respondents in their conclusion was the basis for the judgment and accordingly these grounds become the points of argument.

Point 1. That the appellants' claim against the respondents was not *res adjudicata*.

There was never any notice of default or forfeiture served by the respondents upon the appellants, nor was any action ever taken by the respondents against the appellants upon the contract between the respondents and appellants. The respondents proceeded to recover possession from Lucy Semore and Verda Lynn by an action in the District Court for Weber County, Civil No. 33330 (R.117), but nowhere does it appear that Lucy Semora or Verda Lynn had anything but a possessory interest in the premises. There was no privity of contract between the respondents and any other persons other than the appellants. The appellants never assigned the contract with the respondents to any other party, but contracted anew by separate real estate contract with the subsequent possessors, Watterson, and Watterson subsequently assigned to Goldsby and Clinger. The contract between the appellants and respondents never having been assigned, there is no contractual relationship between the respondents and any other party other than the appellants. The action by the respondents against Lucy Semora and Verda Lynn was solely for possession of the premises under a wrongful detention proceeding, and in no way purported to adjudicate the rights of the parties under any contract. As stated in *Pearce v. Shurtz*, 2 Utah 2d 124, 270 P.2d 442, an unlawful detainer action is an action to remove a tenant from possession and is primarily against the person in possession; it is not similar to a quiet title action where anyone with an interest should be joined (Page 126) and the rights of the defendants under the contract are not considered. (Page 129). The only issue raised

in Civil No. 33330 was that of right to possession as against persons having no contract interest in the property and did not purport to litigate the rights of parties under the contract.

Point 2. The appellants by contracting under a new uniform real estate contract to sell the premises to Wattersons did not lose their estate, interest or contractual rights as against the respondents.

It is to be noted that the appellants at no time assigned, transferred or disposed of any of its interest in the contract between the appellants and respondents, but entered into a new uniform real estate contract with Wattersons. As such the contractual relationship between the appellants and respondents remained and the appellants had separate contractual obligations to Wattersons. Wattersons assigned the Strand-Watterson contract to Goldsby and Clinger. Strand, by notice served January 29, 1958 upon default of Wattersons, Goldsby and Clinger, declared a forfeiture of the Watterson contract which was met by inaction of the part of Wattersons, Goldsby and Clinger. Watterson had agreed by contract to pay Strand \$63,000.00 for the premises payable \$500.00 down and \$13,500.00 by the assignment of equities in two other contracts recited to be worth \$13,500.00, but which in fact may be worth only \$2,000.00 if and when Strand recovers on one of the contracts relating to Salt Lake City property. However assuming that Strand received \$14,000.00 of the \$63,000.00 purchase price, there was still due and owing to Strand the difference between the \$49,000.00 balance due from Watterson to Strand and the \$26,000.00 balance due from Strand to Mayne, a difference of \$23,000.00 still due from Watterson to Strand before Watterson could succeed to Strands interest or equity in the property. If Strand had been paid out by Watterson, instead of still being owed about \$23,000.00, the argument of the respondent that Strand no longer had an interest in the contract may have some merit, but it does not

seem reasonable to contend that a purchaser who contracts to sell his interest thereby forfeits his interest in the property, whether or not his own vendee has performed. While there do not seem to be many cases on this point it has been held that the purchaser is entitled on default of his grantee, to take possession of the premises and carry out the contract of purchase *Hill v. Preston*, 34 S. W. 2d 780, 119 Tex. 522. Even in the case of an assignment it is generally held that the original vendor's acceptance of an assignment made by his purchaser does not place the assignee of the purchaser in privity of contract with the original vendor, 59 A. L. R. 954. Accordingly the privity between the original vendor and the purchaser remains in absence of a novation.

Point 3. Appellants interest in the contract with the respondent has not been forfeited or terminated.

The respondents at no time served notice of default or notice of forfeiture under the contract with the appellants and until such notice is served the issue of damages cannot be resolved. The provision for forfeiture is not self executing and written notice is necessary. *Howorth v. Mills*, 62 Utah 574, 221 P. 165; *Leone v. Zuniga*, 84 Utah 417, 34 P. 2d 699.

Point 4. The appellants are entitled to maintain this action to avoid forfeiture of the improvements and payments made by the appellants.

The appellants and purchasers were in possession of the property about thirty three months, from April 1, 1955 to January 6, 1958, during which period a purchase price of \$41,500.00 was reduced to \$26,188.85, and the appellants made improvements including the creation and equipment of a coffee shop which theretofore did not exist on the premises, with the cost of said improvements of about \$11,726.77. The total investment by the appellants, as re-

viewed supra (P 4), was \$31,194.44. The difference between \$31,194.44, the total investment in improvements and payments by appellants and the rental value for a 33 month period of \$14,850.00 is the sum of \$16,344.44, which is 39% of the original purchase price. The appellants contended that the market value of the property on or about March 20, 1957 was between \$63,000.00 and \$75,000.00 (R. 77) and represented to the court that at the time of repossession on January 6, 1958, the property had a market value of \$63,000.00 (R. 110). The respondents supplied an affidavit dated April 18, 1962 that the market value of the property as of December 15, 1961 was \$35,000.00.

The rule with respect to measure of damages is stated in *Malmberg v. Baugh*, 62 Utah 331, 218 P. 975 to be the difference between the contract price with interest and the value of the land at the time of re-entry, less any payments made on the contract. This doctrine was amplified in *Perkins v. Spencer*, 121 Utah 468, 243 P. 2d 446, and the wording of the opinion is such as to incorporate the basis for relief as being unjust enrichment and unconscionable advantage. *Spencer* sold a home in Provo to the plaintiff *Perkins* and brought suit in the city court in an unlawful detainer action alleging forfeiture of the contract. *Perkins* then commenced an action in the district court to avoid the strict effects of the forfeiture provision. The total purchase price was \$10,500.00 of which *Perkins* had paid \$2,500.00 down and \$75.00 a month, the \$75.00 being a reasonable rental value of the premises. The trial court allowed the defendant to keep the payments as liquidated damages and awarded treble damages for unlawful detainer. This was reversed on appeal, first, as to the treble damages as the notice to quit was not properly served and strict statutory compliance was required. With respect to the forfeiture as liquidated damages of the amount paid, the court reviewed several cases and established certain criteria. The court quotes from *Restatement of Contracts*, Section 339, that the agreement for liquidated damages will be enforceable if (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach,

and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. This court then commenced a review of many Utah cases wherein they state that liquidated damages are enforceable where the amount stipulated is not disproportionate to the damage actually sustained, but that no forfeiture is allowed where the same is unconscionable and exorbitant. In the case of *Cooley v. Call*, 61 Utah 203, 211 P. 977 where the forfeiture amounted to about 10% of the purchase price, and in the case of *Cristy v. Guild*, 101 Utah 313, 121 P. 2d 401, where the monthly income exceeded the total payments plus improvements, this court held that the forfeiture did not amount to a penalty. However in *Malmberg v. Baugh*, 62 Utah 331, 218 P. 975, where \$4,450.00 of the full contract price of \$10,000.00 was paid during the period of occupancy of twenty-two months, this court clearly indicated that they regarded forfeiture of such sum as excessive and would not allow its retention. The opinion of the Perkins case quotes from *Young v. Hansen*, 117 Utah 591, 218 P. 2d 666 as follows:

“The contract did not provide for the retention of money, and even if it did, it is questionable that such provision could be enforced as defendants would acquire an unconscionable advantage and, be unjustly enriched at the expense of the plaintiffs as there is no showing that the defendants had suffered any damage.”

The Perkins case sets forth a formula for determining the damages due the seller as follows:

“The vendors are entitled to any loss occasioned them by any of these factors:

- (1) Loss of an advantageous bargain;
- (2) Any damage to or depreciation of the property;
- (3) Any decline in value due to change in market value of the property not allowed for in items nos. 1 and 2, and

- (4) For the fair rental value of the property during the period of occupancy.

The total of such sums should be deducted from the total amount paid in, plus any improvements for which it would be fair to allow recovery, and any remain difference awarded to the plaintiffs."

Justice Wolf in a concurring opinion states that the market value determined at the time of repossession includes therein depreciation and need not be separately calculated.

In defendant's motion for summary judgment, plaintiffs' contentions must be considered in the light most favorable to the plaintiffs and all doubts should be resolved in favor of permitting the plaintiffs to go to trial; and only if when the whole matter is so viewed, the plaintiffs nevertheless could establish no right to recovery should the motion be granted.

Samms v. Eccles, 11 Utah 2d 289, 358 P2d 344; Morris v. Farnsworth Motel et al. 123 Utah 289, 259 P2d 297.

In the appellants' motion for rehearing (R. 106-108) the appellants requested the trial court to give some indication of the grounds upon which the motion for summary judgment was granted in order that the appellants might present opposing affidavits, amend or otherwise support its position. The court denied the motion for rehearing.

In other cases this court has held:

"It must appear to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim before a judgment on the pleading may be granted."

Securities Credit Corp. v. Willey, 1 Utah 2d 254, 265 P2d 422.

"The sustaining of summary motions without affording the party an opportunity to present his evidence is a stringent measure which courts should be reluctant to grant . . . Accordingly, the privilege of

presenting evidence should be denied only when, taking the view most favorable to the party' claims, he could not in any event establish a right to redress under the law; and unless it clearly so appears, doubts should be resolved in favor of permitting him to go to trial".

Tangren v. Ingalls, 12 Utah 2d. 388, 367 P2d 179.

In addition to the many issues raised by the points above which are yet to be resolved there was the issue of damages for fraud. The respondents took the position that the only remedy which the appellants would have in the event of fraud was for rescission and that their failure to return the premises denied them the right of rescission. There is also the remedy of damages for fraud which is available to the appellants in which they may forgo the right to rescind and retain what they have received and bring an action at law to recover damages sustained. McKellar v. Paxton, 62 Utah 97, 218 P. 128; 24 Am Jur 8, Fraud and Deceit, sections 190 and 191.

Appellants respectfully request that the judgment of the trial court be reversed and the cause remanded for trial.

Respectfully,

GEORGE K. FADEL

Attorney for Appellants